SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 660

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK AND R. B. ROBERTSON

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

Table of Cases Cited

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STATEMENT AGAINST JURISDICTION

The State of North Carolina, the appellee in this appeal from the Supreme Court of North Carolina, files herewith a statement of matters and grounds making against the jurisdiction of this Court as provided by Rule 12 of this Court.

The appellant primarily relies upon three asserted violations of the Constitution of the United States by Sections 2, 3 and 5 of the North Carolina statute regulating contracts of labor organizations. (Chapter 328 of North Carolina Session Laws of 1947.) These will be considered in this statement substantially in the order appearing in appellant's discussion of the nature of the case and argument as to the existence of Federal Questions.

The appellee submits that the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

I

The basic question in this case involves the constitutional authority of the General Assembly of North Carolina to regulate contracts of employment between employers and employees in the interest of public welfare. The North Carolina statute does not prohibit contracts between employers and employees as to wages, hours and working conditions; it does not prohibit collective bargaining, the formation of trade unions, nor does it prohibit union agreements between trade unions and employers. The statute does not authorize the use of injunctions or other legal instrumentalities which now, as well as in the past, have been so odious to and condemned by trade unions. The statute in substance says that an employer, as a condition of employment or continuation of employment, cannot: (a) require a person to become or remain a member of a labor union; (b) require a person to pay any dues, fees or charges to a labor union; (c) require a person to abstain or refrain from membership in any labor union.

If these statutory regulations fall within the scope of the police power of the State, then appellants' contentions as to a violation of the due process and equal protection clauses of the Fourteenth Amendment must fail.

The law to be applied in this case is not the subject of any serious debate. The parties apparently agree as to what has been decided. The appellant cites decisions of this Court upon which we equally rely. Actually the only question they present is whether social and economic conditions in North Carolina were such as to have afforded the General Assembly of this State "any reasonably conceivable circumstances" for enacting the legislation and

"that there is an actual relation between the means and the end."

It would seem there could be but one answer to this question. The opinion of the Supreme Court of North Carolina demonstrates this so conclusively it cannot be reasonably challenged. We are content to rely upon Mr. Justice Seawell's comprehensive statement as to this. Closed shop and other forms of union security contracts occupied the center of the stage of national issues confronting the American people at the time the North Carolina Act was passed. It is idle to say that there was only one side to this question.

It is clearly within the police power of a state "to set the limits of the permissible contest open to industrial combatants," modify the rights of employers and employees to conduct their own affairs in the interest of the public, and prescribe regulations relating to employment contracts.

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578;

Phelps Dodge Corp. v. *N. L. R. B.*, 313 U. S. 177, 61 S. Ct. 845;

Thornhill v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736;

Carpenter's etc. Union v. *Ritter's Cafe*, 315 U. S. 722;

11 *Am Jur.* 1171.

The constitutional authority to restrict freedom of contract between employers and employees is supported by many illustrative cases.

Holden v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383;

Knoxville Iron Co. v. *Harbison*, 183 U. S. 13, 22 S. Ct. 1;

Patterson v. *The Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821;

McLean v. *Arkansas*, 211 U. S. 539, 29 S. Ct. 206;

Chicago, B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549, 31 S. Ct. 259;

Bunting v. *Oregon*, 243 U. S. 426, 37 S. Ct. 435;
New York Central R. R. Co. v. *White*, 243 U. S. 188, 37 S. Ct. 247;
State v. *Justus*, 85 Minn. 279, 88 N. W. 759;
People v. *Washburn*, 285 Mich. 119, 280 N. W. 132; (Appeal denied, 305 U. S. 577; 59 S. Ct. 355.)

The prohibition of the so-called "closed shop" or union shop relates only to incidents or some provisions of a union contract with an employer. It is, therefore, a regulation of some of the features of contracts in this field.

A closed shop cannot be regulated within itself and still retain any semblance of the type of closed shop possessing the preferential qualities that appellants wish to retain. The fact that the closed shop has an historic growth or evolution does not exempt it from suppression for the public welfare. Prescription does not prevail in this field; and if it did, none of the remedial legislation as to hours, wages, working conditions would now be in existence. This is likewise true as to other legislation favoring unions. Union security cannot and should not prove to be a shelter from the police power of a state any more than the maintenance of high corporate profits by means of combinations or agreements in restraint of trade.

The power to regulate contracts in the employer-employee field having been established by many decisions and, indeed, conceded by appellants, if there is a rational basis in the public interest, there remains only the question of the occasion or conditions justifying the use of the power.

The appellants apparently contend that a rational basis having a reasonable relation to the end sought to be accomplished must be established by factual data presented to the Court. This data, it is said, must be of an economic and sociological character. Reduced to its lowest terms, this is nothing but the doctrine that the court should decide

constitutional questions, independent of and aside from legislative judgment, upon the opinions of economists and sociologists. In other words, the court should re-examine the wisdom of the Legislature. Supporting presumptions apparently should be disregarded, and decided advantage should be accorded to the party presenting the most plausible economic brief. If the statute is within the scope of the police power, the legislative enactment should be upheld even though subsequent events prove the statute to be a misguided experiment. Any other theory can convert a grant of powers to the Federal Government and the reserved powers of the people of a State into a complete nullification of the police power of a State.

Appellee does not contend that the legislative determination is final, but it is asserted that judicial review is limited; and if "it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end," the requirement to sustain judicial approval has been met. On this view, it is stated: "The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Stated in other terms by this Court:

> "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record not to see whether the findings of the Court below are supported by the evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."

Stephenson v. *Binford*, 287 U. S. 251, 272;
Erie R. R. Co. v. *Williams*, 233 U. S. 685, 699;
Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 594;
South Carolina Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177;

Nashville, etc., R. R. Co. v. *White*, 278 U. S. 456;
McLean v. *Arkansas*, 211 U. S. 539;
Tanner v. *Little*, 240 U. S. 369;
Chicago, B. & Q. R. R Co. v. *McQuire*, 219 U. S. 549;
Arizona Copper Co. v. *Hammer*, 250 U. S. 400;
Standard Oil Co. v. *Marysville*, 279 U. S. 582;
Gant v. *Oklahoma City*, 289 U. S. 98;
Bayside Fish Flour Co. v. *Gentry*, 297 U. S. 422.

II

As to the equal protection of the law clause of the Fourteenth Amendment, as pointed out in the opinion of the Supreme Court of North Carolina in this case (288 N. C. 352, 368; 45 S. E. (2d) 860, Advanced Sheet, No. 8), the employer-employee relationship has long been recognized as constitutional justification for legislation applicable to persons in that relative status. The North Carolina statute applies equally and alike to all employers and to all employees who are situated in like circumstances and conditions. Section 4 of the North Carolina statute, which the appellants do not contest, specifically prohibits any employer to require an employee to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. The fact that non-union employees may indirectly benefit from the activities of union employees does not render the statute discriminatory. The Act is equally applicable to all employers and employees within the State.

Barbier v. *Connolly*, 113 U. S. 27;
Hayes v. *Missouri*, 120 U. S. 68;

III

The Supreme Court of North Carolina, in a carefully stated and well-written opinion in this case (228 N. C. 352, 368; 45 S. E. (2d) 860, Advanced Sheet No. 8), has examined all of these questions and resolved them against the appel-

lants. The footnotes to the opinion show that the Court, speaking through Mr. Justice Seawell, carefully went into the history of the closed shop, both in England and in the United States. The opinion brings within its scope the investigations and examinations made by the Congress in connection with the National Labor Relations Act, the Railway Labor Act and the Labor-Management Relations Act. The opinion shows, beyond all doubt, that all of these Federal Acts recognize limitations upon the closed shop; and the Labor Relations Act of 1935, as amended, while it authorized union shop agreements, the Act specifically stated that nothing contained in the Act would permit such agreements in States under whose laws they were illegal. The Labor-Management Relations Act shows that the Congress specifically recognized the type of law contained in the North Carolina statue and that as to this phase of the matter, the State could legislate in the same field without nullification by the Federal Act. The opinion further shows that it is based upon factual data of an economic or sociological nature such as is contended for by appellants. The Supreme Court of North Carolina, therefore, having acted upon and considered the case in conformity with the rules of this Court, and this type of legislation being clearly within the police power of the State and the Supreme Court of North Carolina having found that the Legislature acted within its discretion and upon a rational basis for the purpose of alleviating evils and protecting the public welfare, it is, therefore, contended by appellee that no substantial Federal questions have been raised warranting an examination by the Supreme Court of the United States based upon any alleged infringement of the Fourteenth Amendment.

IV

As pointed out in the opinion of the Supreme Court of North Carolina, the statute does not, in any manner, impair the right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas. As further pointed out, the North Carolina statue protects the right of employees to organize and protects their individual opinions by allowing them to refuse to join a trade union. There is, therefore, no infringement of the Fourteenth Amendment as to the rights of free speech and assembly as guaranteed by the First Amendment.

V

At the time of the issuance of the opinion of the Supreme Court of North Carolina, fifteen States had adopted laws prohibiting closed shops either by constitutional amendment or by legislative act. The same problem has had a limited consideration by the Congress of the United States. The constitutionality of the Railway Labor Act (44 Stat. 577), which prohibits a closed shop or a "yellow dog" contract, has been sustained. See *Shields* v. *Utah-Idaho R. R. Co.*, 305 U. S. 177 and *Va. Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. We, therefore, summarize our position by quoting an excerpt from the opinion of the Supreme Court of North Carolina as follows:

> "We are not called upon here to determine the wisdom of the Legislature's action in adopting Chapter 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution. In determining that question we believe that Article I, Section 17, should be viewed in the same light Justice Holmes regarded the Fourteenth Amendment: 'There is nothing I more deprecate than the use of the Four-

teenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect.'

"While, perhaps, we do not share the resentment expressed by the great Jurist, we may point out that the Congress seems to have made clear its intention to recognize as valid the particular experiment inaugurated by Chapter 328.

"In summary, the case, stripped to decisional factors, falls into simple lines. The power of the State by general legislative act, in the exercise of its police power, to condemn private contracts found to be injurious to the public welfare, to declare them contrary to public policy and prevent their consummation cannot be denied. Exercised within constitutional limitations, it is both a necessary and a salutary function of government, the exercise of which is not infrequently an exigent duty. Within those limitations the occasion justifying the exercise of the power is within the legislative discretion, provided only that its action is not arbitrary or capricious and has a reasonable relation to the end sought to be accomplished."

Appellee, therefore, asserts that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

MOTION TO DISMISS OR AFFIRM

For the reasons set out above, the appellee submits that the questions on which the decision of this case depends are so unsubstantial as not to need further argument. All of the constitutional questions raised by this appeal have been thoroughly argued, examined and decided in the Supreme Court of North Carolina. There are, therefore, no substantial grounds upon which this Court should assert its jurisdiction or should find that substantial Federal questions are at issue.

Therefore, the appellee respectfully moves the Court that this appeal be dismissed or affirmed.

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